IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 6625 of 2005

AVTAR SINGH & ORS.
V/S
STATE & ORS.

Mr. HSS SIDHU, Mr. RAMANDEEP SINGH for Mr. HSS KHARLIA, Mr. MK GARG, Mr. SUDHIR SHARMA & Mr. GJ GUPTA, for the appellant / petitioner.

Mrs. RR KANWAR & Mr. OP BOOB, for the respondent
Mr. DRON KAUSHIK, for the applicant.

Date of Order : 21.3.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

This matter comes up for consideration of stay petition, and since identical controversy is involved in numerous cases, vide different orders, passed in different files on different dates, many of the matters have come to be listed today, though under different heads, so much so that some cases have not been admitted so far, while in some cases the notices of the respondents were awaited, while some cases had been admitted, and interim stay is granted, while in some cases without grant of any interim stay, stay applications are pending. In view of the above, this order is passed in all the cases, as listed in Schedule-A, and a copy of this order be placed on each of the files mentioned in Schedule-A.

In view of the different stages in different cases, all those petitions which have not been admitted so far, are admitted, and Mr. Boob, and Mrs. Kanwar accepts notice on behalf of the respondents. Likewise in cases where show cause notices had been issued, in all those cases also Mr. Boob and Mrs. Kanwar accept notice. As such service is complete, and those petitions are also admitted.

Thereafter I have heard learned counsel for the parties on the stay application.

Though different cases have different facts about identity of chak number and/or Killa number and/or the size of the outlet, or the jurisdiction of the Divisional Engineer concerned, but then all these cases involve common point of law, on the basis of which these petitions have been filed, and have been admitted. For the above purpose, devoid of unnecessary details, the skeleton facts are, that on 12.3.2005 a meeting was held under the chairmanship of Hon'ble Irrigation Minister regarding correction of the size and levels of the outlets in Gang,Bhakra and Indira Gandhi Nahar Project upto RD 1254, and according to the discussions of the meeting, directions were given to various authorities concerned upto Ex.EN, and A.EN, and System wise Supervisory Committee, District Level Superintendence, and Apex Committee were constituted.

Pursuant to this consideration in the meeting follow up orders have been passed by the Chief Engineer, directing the concerned Superintending Engineer, who in turn directed the Divisional Engineer, and so on, to make corrections in accordance with the said meeting.

The challenge mainly is on the ground, that under the Irrigation and Drainage Act, and the Rules framed thereunder, a procedure has been prescribed under Rule 11, according to which, no material change can be made in the established system of canal distribution except under the orders of Divisional Irrigation Officer, appeal against which shall lie to the Superintending Irrigation Officer, and that notice for the reduction and removal of outlets with brief reasons therefor is to be issued by the Divisional Irrigation Officer (Executive Engineer), and given adequate publicity through Panchayats, requiring all persons affected by such reduction or removal, to submit their objections in writing to the Divisional Irrigation Officer, and the Divisional Irrigation Officer shall after considering all such objections make necessary orders. The challenge is on the ground that no notice, as required by Rule 11(3) is given, which is mandatory. The other submission made is, that under the rules, orders can be passed only by the Divisional Irrigation Officer, and the State Government has no power to pass such order, with the result, that the order is without jurisdiction. Then, the

next submission made is, that the effect of passing of the order passed by the State Government or the Superintending Irrigation Officer is, that the right of appeal available to the petitioner is lost. To substantiate these arguments, learned counsels relied upon various judgments of this Court, and it was submitted, that since the writ petitions have been admitted, and in couple of matters, after hearing the counsel for the respondent, interim stay has been confirmed, to maintain uniformity, identical orders are required to be passed in these cases also, directing status quo to be maintained.

Learned counsel for the respondent, on the other hand submitted, that by the impugned orders the state is not reducing the sanctioned quantity of water, and that on account of improvement of the drainage system the level has increased. Then, it was submitted that in Prem Singh Vs. State of Rajasthan, reported in AIR 2001 Rajasthan-309, this Court has approved the type of action taken in the present case, and to the respondents' knowledge this order has not been challenged before the Division Bench, and has thus acquired finality.

So far the legal principle about requirement of maintaining uniformity in the orders is concerned, there is no dispute in this legal proposition. Likewise, as an abstract proposition, it is also not in dispute, that if an

order is passed by the higher authority, who has no power or authority, and the right of appeal is lost, the order may be bad. In that view of the matter, I need not detain myself on these questions, to substantiate which, few judgments were cited by the learned counsel for the petitioner.

I may straightway come to the judgment cited by the learned counsel for the petitioner being Jarnel Singh Vs. State of Rajasthan, reported in RLW 1992(1)-362, and Jaswant Vs. Mani Ram, reported in 2005(1) CDR (Raj.)-850 which according to the learned counsel, laid down, that even for making any alteration in the outlet, or to resize the outlet the procedure as provided by Rule 11 is required to be followed, and that, before making alternation, adversely affecting cultivator's right, notice is necessary.

So far as Jarnel Singh's case is concerned, that is a Division Bench judgment, and Division Bench was considering validity of Rule 11, which was challenged, being ultravires to the provisions of the Act, as the Act does not authorise shifting, varying, opening, and closing of outlet under the provisions of the Act, and that Section 31 does not authorise framing of any such rule as framed, and Hon'ble the Division Bench upheld the validity of the rule, on the basis, that opening, closing, varying, and shifting of outlet, is perfectly relatable to the Act, for

which the powers by the authorities under the Act can be exercised, and that merely because the said rule is not covered under Section 20, it cannot be said, that establishment of new outlets or closure, shifting and varying in existing outlet is beyond the scope of power to be exercised under the Act, and that, even if it is assumed, that there is no specific provision, to which the impugned rule can trace its origin, even then undisputedly there is no prohibition against framing of such rule, so long as the rule can be related to the general purpose, for which the Act has been enacted, it would be within the province of the rule making authority to frame the rules. Thus this judgment does not help the petitioner, for the purpose for which it was relied upon.

Then, so far Jaswant's case is concerned, that again is of no help to the petitioner, inasmuch as that appears to be dispute between two private parties, as one party applied for change in the size of the outlet, and the Superintending Engineer discussed the matter on technical viability, and passed the order of alternation in the size of outlet, which order has been upheld by the Division Bench, by allowing the appeal against the judgment of the learned Single Judge, who had set that aside. The learned Single Judge had set aside the order with assumption, that the Superintending Engineer rejected the application by holding, that before making correction in the record, and

for a change in the size of the outlet, no previous notice or hearing was required, while it was found, that this ground was non-est. This is one aspect of the matter.

The other important aspect of the matter is, that a look at sub-rule (1) of rule 11 does show, that it casts a duty on the Divisional Irrigation Officer, not to authorise outlets on any canal, exceeding the authorised, or actual canal capacity, whichever is less, so that on release, water may run in the canal from head to tail, and that no irrigation from canal will be drawn from outlets other than those authorised by the Divisional Irrigation Officer, and the outlets so not authorised, may be removed, and no claims against this, in this respect, shall lie against the Government, and that persons violating this rule shall be liable to punishment under Section 55(9) of the Act. It is in this sequence, that sub-rule (2) contemplates that no material change shall be made in an 'established system of canal distribution' except under the orders of the Divisional Irrigation Officer, and the meaning of 'Established Irrigation System' is to be gathered from the provisions of Section 3(ii), which defines "Irrigation Works" to mean a work or system of works, natural or artificial, not being a minor irrigation work, and includes the various works as detailed in sub-clauses (a)(b)(c) and (d). Thus, a proper reading of the various clauses of Rule 11 would show, that the notice

contemplated by sub-rule (3) is, where a reduction or removal of outlet is contemplated, by way of material change in an established system of canal distribution, and obviously, the other requirements of the following sub-rules have to be fulfilled in that event. In the present case it is nobody's case, that any change is going to be made, or even contemplated, in an ‘established system of canal distribution’. Therefore, the provisions of Sub-rule (2), (3) and (4) etc. have no bearing whatever, rather the minutes of the meeting dt. 12.3.2005, and the consequent orders are in the light of the letter and spirit of the provisions of rule 11(1).

In view of the above, and positive prohibition enacted in Rule 11(1), the petitioner cannot claim any protection from this Court, to authorise them to irrigate from the canal, or from the outlets, water exceeding the authorised capacity or quantity, so as to negate the provisions of Rule 11(1) and Section 55(9) of the Act. This is second aspect of the matter.

Though not very necessary yet it may be observed that even under sub-rule (3) of Rule 11 all that is required is that the notice is to be issued, and given adequate publicity through Panchayat, and it does not specifically provide for personal service of the notice on each individual cultivator. Likewise even in sub-rule (4)

also provision is made for giving adequate publicity through Panchayats. In this background even from a look at the minutes of the meeting of 12.3.2005 it is clear that therein also it has been provided as under:-

> "Publicity:
>
> Adequate publicity through Print and Electronic media to avoid any misunderstanding amongst cultivators should be done. Cable TV of concerned areas should also be used for this purpose. All complaints received should be timely and properly addressed through a Help line which should be set up by the Collectors. People should be taken into confidence before the campaign. News appearing in the local news papers of the districts should be taken special care of. Regular advertisement should be flashed in print media stressing upon the aims and objectives of the task. Display Boards depicting designed data and other vital information would be fixed on each outlet after corrections."

Yet third aspect of the matter is, that for the sake of arguments, even if it were to be assumed, that the order of the Committee or the Chief Engineer can somewhere be found fault with by, undertaking a hyper technical hair spinning exercise, even in that event, it is established legal position, as laid down by a Full Bench of this Court in Jagan Singh Vs. State Transport Appellate Tribunal, reported in AIR 1980 Rajasthan-1, and subsequent plethora of decisions of Hon'ble the Supreme Court, right upto the date, to the effect, that exercise of jurisdiction under Article 226 of the Constitution would not be available, even in cases, where the order impugned is illegal, or without jurisdiction, if the consequence of such exercise

is to restore another illegality. In the present case, if the stay, as prayed for is granted, that will straightway have the effect of violating the provisions of Rule 11(1), so also Section 55(9) of the Act, and therefore, the stay in terms of the prayer made cannot be granted. Likewise, in the cases, where no interim order exists, the stay as prayed for cannot be granted. It is yet different aspect, that in Prem Singh's case, this Court had upheld such an exercise by the Superintending Engineer, who passed the orders of such general nature.

Thus, in view of the above discussion the stay applications are allowed, in the manner, that the respondents shall not in any manner take any such step, which may affect, or reduce, the water supply even in micro level, below the one originally sanctioned, to each of the petitioners. Obviously the interim order, if exists in cases mentioned in Schedule-A, shall accordingly stands modified. It is, however, clarified and further directed that in any case where the existing Rabi Crop is existing unharvested, and is in the requirement of water for its proper ripening, then in those cases the cultivator shall be continued to be provided the water as was being provided hitherto-fore, this present order in those may be given effect to after the requirement of water to the crop in the particular field of the particular cultivator is over.

(N P GUPTA),J.

SCHEDULE-A

1. S.B.Civil Writ Petition No.6507/2005
   (Himmat Singh Vs. State & Ors.)

2. S.B.Civil Writ Petition No.557/2007
   (Hardev Singh & Ors. Vs. State & Ors.)

3. S.B.Civil Writ Petition No.519/2007
   (Makhan Singh & Ors. Vs. State & Ors.)

4. S.B.Civil Writ Petition No.6812/2005
   (Gurnam Singh & Ors. Vs. State & Ors.)

5. S.B.Civil Writ Petition No.7184/2005
   (Balvinder Singh Vs. State & Ors.)

6. S.B.Civil Writ Petition No.6292/2006
   (Baljinder Singh Vs. State & Ors.)

7. S.B.Civil Writ Petition No.109/2007
   (Yadvindra Singh & Ors. Vs. State & Ors.)

8. S.B.Civil Writ Petition No.144/2007
   (Gurcharan Singh & Ors. Vs. State & Ors.)

9. S.B.Civil Writ Petition No.212/2007
   (Sanjiv Kumar & Ors. Vs. State & Ors.)

10. S.B.Civil Writ Petition No.471/2007
    (Sunil Kumar Vs. State & Ors.)

11. S.B.Civil Writ Petition No.3988/2006
    (Darshan Singh & Ors. Vs. State & Ors.)

12. S.B.Civil Writ Petition No.3989/2006
    (Charandeep Singh & Ors. Vs. State & Ors.)

13. S.B.Civil Writ Petition No.5870/2006
    (Mahendra Singh & Ors. Vs. State & Ors.)

14. S.B.Civil Writ Petition No.6073/2006
    (Gurvindra & Ors. Vs. State & Ors.)

15. S.B.Civil Writ Petition No.6074/2006
    (Charanjeet Singh & Ors. Vs. State & Ors.)

16. S.B.Civil Writ Petition No.6122/2006
    (Pareetam Singh & Ors. Vs. State & Ors.)

17. S.B.Civil Writ Petition No.6123/2006
    (Karnail Singh & Ors. Vs. State & Ors.)

18. S.B.Civil Writ Petition No.6462/2006
    (Kashmir Singh & Ors. Vs. State & Ors.)

19. S.B.Civil Writ Petition No.6798/2006
    (Hazara Singh & Ors. Vs. State & Ors.)

20. S.B.Civil Writ Petition No.6799/2006
(Krishan Lal & Ors. Vs. State & Ors.)

21. S.B.Civil Writ Petition No.6941/2006
(Balwant Singh & Ors. Vs. State & Ors.)

22. S.B.Civil Writ Petition No.7239/2006
(Gurucharan Singh & Ors. Vs. State & Ors.)

23. S.B.Civil Writ Petition No.3510/2005
(Mahal Singh & Ors. Vs. State & Ors.)

24. S.B.Civil Writ Petition No.1309/2006
(Sewa Singh & Ors. Vs. State & Ors.)

25. S.B.Civil Writ Petition No.5705/2006
(Preetam Singh Vs. State & Ors.)

26. S.B.Civil Writ Petition No.5706/2006
(Dilbagh Singh & Ors. Vs. State & Ors.)

27. S.B.Civil Writ Petition No.163/2007
(Ajayab Singh Vs. State & Ors.)

28. S.B.Civil Writ Petition No.689/2007
(Avtar Singh Vs. State & Ors.)

29. S.B.Civil Writ Petition No.851/2007
(Pritam Singh & Ors. Vs. State & Ors.)

30. S.B.Civil Writ Petition No.897/2007
(Sita Ram & Ors. Vs. State & Ors.)

31. S.B.Civil Writ Petition No.1100/2007
(Wazeer Singh Vs. State & Ors.)

32. S.B.Civil Writ Petition No.6424/2005
(Iqbaal Singh & Ors. Vs. State & Ors.)

33. S.B.Civil Writ Petition No.6949/2005
(Jagvinder Singh & Ors. Vs. State & Ors.)

34. S.B.Civil Writ Petition No.3987/2006
(Trilok Singh & Ors. Vs. State & Ors.)

35. S.B.Civil Writ Petition No.5237/2006
(Kapoor Singh & Ors. Vs. State & Ors.)

36. S.B.Civil Writ Petition No.5238/2006
(Satpal Singh & Ors. Vs. State & Ors.)

37. S.B.Civil Writ Petition No.5240/2006
(Avtar Singh & Ors. Vs. State & Ors.)